(14)

No. 84-1513

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DANTE CARLO CIRAOLO,

Respondent.

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I

LEGITIMATE PRIVACY EXPECTATIONS ARE NOT VIOLATED BY POLICE OBSERVING A FENCED RESIDENTIAL YARD EXPOSED TO VIEW FROM NAVIGABLE AIRSPACE WHICH IS A PUBLIC AREA SUBJECT TO ROUTINE PATROL

Respondent Ciraolo contends that his yard was curtilage entitled to protection from warrantless searches

to the same extent as the home itself. (Resp. Br. 5-12.) Ciraolo argues that the aerial observation was a search because it was undertaken to bypass his fence and to collect evidence of criminal activity by means of an unanticipated "technological presence" focused at his yard. (Resp. Br. 12-29.) According to Ciraolo, he did not "waive" his Fourth Amendment rights by failing to protect his yard from aerial observation. (Resp. Br. 29-30.) Ciraolo also suggests that an administrative warrant requirement may be an acceptable accomodation of privacy expectations and the governmental need to investigate. (Resp. Br. 30-31.)

This Court should reject those contentions. The fact that Ciraolo's marijuana was grown inside a fenced backyard to which police did not have physical access does not create a legitimate expectation against police observation from a public place,

navigable airspace, indisputably an area which they may patrol on a routine basis and, hence, a place where they have a right to be. No decision of this Court reflects that police lose the right to be in a public place because they are engaged in criminal investigation and believe evidence of such activity may be exposed to view from that place. It is sophistical to say that technology which permits police to enter navigable airspace - an airplane - is unanticipated in a criminal investigation when the use of that very technology is undeniably expected and accepted for routine police patrol during which identical incidents of visual observation as occurred in this case can lawfully take place.

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A. Ciraolo's Approach Which Requires Police To Avert Their Eyes From Fenced Residential Yards During An Aerial Observation Undertaken To Investigate Suspected Criminal Activity Is Unworkable.

1. The Protections Afforded The Home's Security Under The Fourth Amendment Do Not Prohibit Police From Observing "Curtilage" From A Point Of Public Access Where Routine Police Presence Is Accepted As Reasonable By Society.

The question whether the aerial observation in this case constituted a warrantless search is not answered by Ciraolo's argument that the curtilage is entitled to the same protections from searches given the home itself. To quote Ciraolo, after Katz v. United States, 389 U.S. 347 (1967), "[w]hether or not a 'constitutionally protected area' was involved was no longer the solution to preserving the security the framers protected by the Fourth Amendment." (Resp. Br. 14.) It does not rationally follow from the fact that Katz justifiably expected by enclosing himself

in a telephone booth that his conversation would "not be broadcast to the world", 389 U.S. at 352, that enclosing a marijuana garden inside a residential fence entitles one to think that the label of "curtilage" protects that garden from being seen by the world.

Indeed, nothing in Ciraolo's brief suggests that the curtilage doctorine demarcates a point at which blanket expectations against observation from public areas outside its perimeter exists. Ciraolo appears to recognize (Resp. Br. 11), that the curtilage doctrine originally defined those areas of the home encompassed within the common law offense of burglary (4, Blackstone, Commentaries on the Laws of England, 225 (Univ. of Chicago Press 1979).) Its historical basis in concepts of wrongful trespass into the security of the home has been carried

into the Fourth Amendment context as a limitation on warrantless physical entries, see, Oliver v. United States, 466 U.S ___, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984), and not as a protection against police detection of things outside the home which were seen from points open to the general public and police alike. See United States v. Karo, 468 U.S. ___, 82 L.Ed.2d 530, 541-542; 104 S.Ct. 3296, 3303-3304 (1984); United States v. Knotts, 460 U.S. 276, 281-285 (1983); e.g., United States v. Santana, 427 U.S. 38, 42 (1976); Hester v. United States, 265 U.S. 57, 59 (1924).

The Fourth Amendment concerns itself with government activity invading "[t]he right of the people to be secure in their . . . houses." That guarantee is alien to protections sought to vindicate an individual's subjective estimation of the likelihood of discovery

by police. United States v. Jacobsen, 466 U.S. ___, 80 L.Ed.2d 85, 100; 104 S.Ct. 1652, 1661 (1984). Moreover, the protections afforded by that guarantee are not shaped according to hypothetical possibilities that the public might (or might not) discover something and report it. See United States v. Karo, 468 U.S. at ___, 82 L.Ed.2d at 542, n. 4, 104 S.Ct. at 3304, n. 4 (1984).

Hence, Ciraolo's appraisal of the possibility of a "glance from a passing aircraft" at his yard, the intensity with which the airborne public might look, and the respective qualities of the untrained airborne observer's vision as against the "practiced eye" of the policeman's gaze (Resp. Br. 29-30), no more indicates illegality in police viewing his yard from navigable airspace with the naked eye than his asserted expectation against having his yard so viewed. The very fact that Ciraolo's

expectations rest upon such individualized appraisals, not discoverable by airborne officers in advance of viewing a yard, demonstrates their impracticality as a guide for police.

In any event, the protection of the home afforded the curtilage from warrantless searches does not translate, as Ciraolo implies, into protection against governmental observation of curtilage that might violate the Fourth Amendment if directed into the interior of the home. Police walk up paths, sidewalks or driveways to contact residents during criminal investigations without warrants, consent or exigent circumstances. Naturally they see curtilage when they do. But police may not enter the home itself without authorization.

Even the "private" e.g., fenced, areas of curtilage are not

subject to the same degree of visual protection as afforded the home. Ciraolo joins the Court of Appeal in distinguishing this case from those where police "focus" on fenced residential yards during "generalized air patrol". (Resp. Br. 29.) But warrantless "patrol" of the home's interior could never be permitted. Ciraolo must, therefore, concede that material differences do exist between the protections afforded from visual observation of (and, hence, the visual privacy legitimately expected in) the curtilage as opposed to the home itself with respect to aerial observation.

If those protections are the same, Ciraolo's distinction between fenced and unfenced curtilage makes no sense. The privacy expected inside the home would subsist in the curtilage regardless of one's ability to enclose a yard from ground view. Yet, Ciraolo

rejects this result (Resp. Br. 25) just as we do.

Ciraolo flounders on the horns of a dilemma produced by the California court's tortured logic: either the protections inside the home from aerial observation are qualitatively different than those afforded in the curtilage or they are not and, if it is the latter, police "search" if they look from the air even if the yard can be seen from the ground.

While Ciraolo labors to prove that the home and curtilage are identically protected from warrantless searches, he cannot avoid the paramount characteristic of aerial observation from navigable airspace of curtilage, as in this case, which is absent in cases of intrusion into the home's interior: as a practical matter, the governmental conduct in the former situation discloses to the senses of police things which are

accessible to the public and police alike in ways that things inside the home simply are not.1/

Given this basic reality, and the fundamental fact that the curtilage doctrine focuses on physical invasions which defeat the security enjoyed in the home (not the mere hope that things in the curtilage might be unseen), it

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1. Ciraolo appears more than a little sensitive to the force of this point. He asserts not less than three times in the course of his brief that no evidence of other aircraft flying over his yard exists (Resp. Br. 3, 29, 30, n. 19); an observation utterly irrelevant to his own analysis which would render the police conduct herein a search even if he lived at the end of a runway. In any event, while Ciraolo is free to argue that Officer Schutz's testimony that the airplane was in a flight line (J.A. 38) refers to a flight line over someone else's house, he is not free to deny the reasonable inference that it was precisely his house to which the officer addressed his remarks. Indeed, the record suggests that the trial court drew that inference. During argument on the suppression motion, the court asked rhetorically, "People live around airports, they have to expect overflights, don't they?" (J.A. 62.)

should be no surprise that cases holding aerial observation of curtilage violative of the Fourth Amendment, apart from the present one, have focused squarely on physically intrusive conduct by police. Nat. Org. for the Reform of Marijuana Laws v. Mullen, 608 F.Supp. 945, 955-958 (N.D. Cal. 1983) (appeal pending No. 85-1883, 9th Cir.) (helicopter "buzzings", "hoverings" and "dive bombings".); People v. Sneed, 32 Cal.App.3d 535, 542-543, 108 Cal.Rptr. 146, 150-151 (1973) (low altitude helicopter hovering.).

It is a legitimate investigative technique for police to observe a residential yard for suspected criminal activity from a point of public access where the presence of police on patrol is accepted by society and where identical incidents of visual observation routinely occur.

The decision of the Court of Appeal does not represent any modest judicial gloss to principles that police cannot invade homes on suspicion or terrorize hapless occupants with frightening technological inventions. Rather, it stands alone, at war with commonplace reality and the weight of authority alike, as an injunction to police to avoid looking for something intentionally from a point at which they are otherwise permitted to see the same thing routinely.

2. Ciraolo's Focus And Purposeful Evasion Tests Do Not Provide Practical Guidance To Police.

The crux of respondent Ciraolo's position, stated in his second argument, is that the police unconstitutionally "focused" on his yard from an airplane in order to bypass his fence. (Resp. Br. 12.) Under this argument, a focused view of curtilage is

a search unless the curtilage is "already open to public view". (Resp. Br. 25.) Thus, a warrant would be required "only when the purpose of the police is to the use the airspace in a deliberate attempt to breach the privacy of a resident upon whom their suspicion is focused . . ." (Resp. Br. 25.)

Ciraolo advances a highly fact specific test of what aerial observations constitute a search dependent upon (1) the curtilage being closed to ground view;[2/] (2) use of aircraft by police to evade measures taken to conceal activity; and (3) "focus" on specific curtilage to gather evidence. These criteria do not accord significance to the extent to which physically intrusive conduct marks

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2. Resort to aerial observation could not be characterized as having been undertaken to "bypass" a fence unless, in fact, a residential fence precluded observation from all ground areas outside its perimeter available to police.

an overflight, nor the degree to which specialized technology is employed in the course of overflights which disclose to the police the intimate activities of the home otherwise imperceptible to the police or the public from navigable airspace.[3/] Moreover, they have the effect of denying protection to those countless individuals who cannot exclude all ground view of their yard.

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3. To be sure, Ciraolo and defense amici attempt to imply that such concerns are involved here by a subtle factual distortion of the record meant to suggest that the aerial photograph was used to identify his plants as marijuana (Resp. Br. 2) and by characterizing the overflight as "low-flying" (ACLU Br. 13). The record shows, however, that the identification was made without visual aids (J.A. 12-14, 32-33, 36) while in a flight line with the San Jose airport during which police "had to watch for other aircraft." (J.A. 38.) In any event, Ciraolo appears oblivious to the fact that his test of a search would permit sophisticated technological surveillance which he and defense amici decry to be undertaken without a warrant so long as it was not "focused" at a specific property or, if focused, so long as the property was not closed to ground view.

Ciraolo cites Katz v. United States, 389 U.S. 347 (1967) and United States v. Karo, 468 U.S. ___, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984) as supportive of his position. However, neither decision aids his argument that police search when they "focus". Certainly the police are not in a better position if they randomly overhear conversations within telephone booths or homes by aiming parabolic microphones. See United States v. Karo, 468 U.S. at ___, 82 L.Ed.2d at 539, 104 S.Ct. at 3302.

Ciraolo simply offers no reason why "generalized" aerial observation of curtilage is to be constitutionally preferred and "focused" observation prohibited. In terms of visual privacy, it is difficult to discern where the difference lies other than the broader scope of the former. Regardless of how a particular aerial observation is characterized - random, routine, focused

or something else - the police look at something specific. The discrimination of the viewer is always "focused" at a particular place in the very act of looking. While Ciraolo stresses that the focus is undertaken by the "practiced eye" of the policeman (Resp. Br. 30), this is true of all criminal investigation. If focusing was relevant, visual discrimination in any kind of police observation of curtilage would suggest that what occurred was a search.

The "focus" argument, thus, threatens to swallow Ciraolo's own test for, at least at the moment of looking, the observation simply is no longer "generalized". If, however, one insists on defining bad focus from good focus, the problem becomes drawing a bright line so that police know in advance what searching is. Do police focus too much if a tip directs them only to an

intersection, a particular street or a group of homes? While Ciraolo does not provide guidance, undoubtedly a premium would be laid on police remaining ignorant, e.g., not to ask an informant too much about specific locations before flying; a result farcical in the very statement of it.

A similar problem exists with respect to Ciraolo's argument that police err when they use an airplane to "jump" a residential fence. (Resp. Br. 5.) Under this argument, Officer Schutz's fatal mistake was in first undertaking ground observation which resulted in discovering the yard was closed to view from the street, activity which Ciraolo explicitly states was lawful. (Resp. Br. 28.) Had police instead flown by Stebbins and Clark Avenues immediately upon receipt of the tip to look at each yard in that vicinity police presumably could not have been found guilty of purposefully evading

Ciraolo's fence. Thus, Ciraolo's argument has "the perverse affect of penalizing the officer for exercising more restraint than was required under the circumstances." Washington v. Chrisman, 455 U.S. 1, 8 (1982). Here again, the lesson to be gleaned by police would be to maximize one's ignorance of what one was seeking and where to find it. It is hard to see what privacy interest is thereby advanced.[4/]

The Court of Appeal did not state its holding in terms of whether

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4. It can be argued that police will usually desire the maximum amount of information in advance of aerial observation if only to make their job easier. To the extent that is true, however, Ciraolo's test rests for purposes of its enforcement on ferreting out how much the police knew and when they knew it as against whatever benefits to police may exist by dissembling on the degree to which they "focused" on a yard or "purposefully evaded" a fence. While we alluded to

(FOOTNOTE 4 CONTINUED)

police purposefully evaded a fence. Rather, the California court simply concluded that a search occurs where police intentionally look into a specific residential yard protected by a fence like Ciraolo's. (Pet. App. A: 18-19.) Ciraolo's purposeful evasion test is mere gloss obsuring a fundamental defect in the California court's decision: it cannot seriously be argued that fences place an officer in a position to avoid looking from an airplane into curtilage. Once the officer sees a residential fence from the

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(FOOTNOTE 4 CONTINUED)

this problem previously (Pet. Br. 43, n. 16), Ciraolo does not discuss it. We think the problem merits attention because likely as not, the result of Ciraolo's test would be to engage the courts in prolonged and quixotic inquires into whether an officer was truly as ignorant as he might hope to appear. Cf., United States v. Leon, 468 U.S. ___, ___ 82 L.Ed.2d 667, 698, n. 23; 104 S.Ct. 3405, 3421, n. 23 (inquiry into officer's subjective good faith eschewed.)

air, assuming even its visual opaqueness to ground view can be detected, police almost certainly will simultaneously see the yard i.e., "search." As we have previously stated (Pet. 16), in many cases the officer will not know he has "searched" until he has already seen. The ruling Ciraolo seeks to affirm, thus, condemns governmental action as a warrantless search without telling police how to avoid the illegality.

All of this is preliminary to the problem which infects defendant's argument to the same degree it infected the contention of the defendants in Oliver v. United States, 466 U.S. ___, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984). If, as Ciraolo and defense amici argue, only reasonable measures must be taken to protect curtilage from public view before protection from "focused" aerial observation arises under the Fourth Amendment, but no protection is afforded

where curtilage is already open to "public view", when do those measures become sufficiently "reasonable"?

We quote the amicus curiae brief of the Civil Liberties Monitoring Project in this case:

> "To distinguish among Ciraolo's suburban home and a suburban home without a fence; or one with a high wall and many trees around it and one without trees; or a rural home in a remote location protected by dogs and fences and rural home hidden in the woods would only deepen the quagmire of Fourth Amendment jurisprudence." (CLMP Br. 26.)

If the quagmire is deep distinguishing between houses with and without fences - precisely the distinction drawn by the California Court - it is hard to imagine how treacherous the bog may be distinguishing between short and tall fences, or well-maintained and poorly-maintained fences. And it is the officer who would be required to make those distinctions in first instance

while looking from an airplane. Ciraolo's test, like the Court of Appeal's decision, is not aimed at letting police know how to comply with the Fourth Amendment but at frustrating compliance altogether.

The problem of what measures are reasonably required is not merely of abstract interest. Ciraolo's argument that he did everything he could be required to do to preserve the privacy of his yard (Resp. Br. 29) is simply untrue. Perusal of the aerial photograph before this Court with a magnifying glass reveals that Ciraolo's neighbor immediately to the east on Clark Avenue has a pool in his backyard and could see into Ciraolo's yard at will from atop a waterslide adjacent to their common fence. Plainly, Ciraolo took only those measures which he deemed sufficient to protect the degree of privacy he felt was desirable, something

quite different than all measures that could be expected.[5/]

Ciraolo's argument that he should not be required to "surrender access to air and light" to preclude aerial observation (Resp. Br. 29) might be appealing if the question was whether Fourth Amendment rights can ascend into the airspace to achieve legitimacy. However, the question is not whether they

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5. Of course, any number of reasons might exist why Ciraolo did not block his neighbor's view. Perhaps Ciraolo feared a suit for maintenance of a spite fence. (Cal. Civil Code, § 841.4). It might be a covenant or ordinance prohibited it. But this only muddies the waters deeper. In some areas, an aesthetic ordinance or covenant might permit only short picket fences. A person subject to such constraints would seem to be entitled to claim that he too has done all he can reasonably do to protect his privacy. It is not easy to say why that person should be held to have "waived" his Fourth Amendment rights either.

The answer, we submit, is that individual has not waived Fourth Amendment rights because the rights protected do not hinge on fences.

can but under what circumstances. Ciraolo ignores the fact that police aerial observation, even on a routine patrol basis without probable cause or even suspicion, demonstrably did not drive him into a lightproof box. If that is so with respect to a person who clearly has reason to hide, it strains credulity to believe those who lack such reason feel their personal security is jeopardized when aerial observation is undertaken to investigate a specific report. Stated otherwise, if routine air patrol is permissible, then whether one chooses to conceal activity from aircraft - or as Ciraolo puts it to surrender air and light - is a product, not of impermissible governmental presence in navigable airspace, but the individual's expectancy whether something desired to be private will be detected. That expectancy may prove wrong, but the Fourth Amendment, we

submit, does not fill in merely because the chances of discovery appear not worth the trouble of guarding against. And to the extent practicalities make it difficult to protect certain outdoor activities from observation by the police in a public area, that fact suggests it is not private activity in the sense contemplated by the Constitution.

3. The Fact That Police Observe A Residential Yard By Using An Aircraft Does Not Give Rise To Fourth Amendment Violation.

Ciraolo argues that the danger of technological surveillance of the "intimate areas of our lives" justifies a warrant requirement in this case. (Resp. Br. 17.)

The danger petitioner raises is a hypothetical one not involved in this case. If regulation by warrants was justified by the mere potential that aerial observation of the sort herein would reveal intimate activities it would

justify regulation of routine air patrol as well since nothing was seen in this case that could not otherwise be observed by the latter means. The fact is, however, no such "intimate activities" were observed unless everything in backyards, including plants visible to the naked eye in navigable airspace is intimate. It is clear that "potential, as opposed to actual, invasions of privacy [do not] constitute searches for purposes of the Fourth Amendment." United States v. Karo, 468 U.S. at ___, 82 L.Ed.2d at 539, 104 S.Ct. at 3302.

Ciraolo appears to argue that the police view from an aircraft is that of a technologically-aided Peeping Tom. (Resp. Br. 21.) But it is highly unusual to apply that pejorative to a view had by everyone who flies. If the Peeping Tom is not subject to actual criminal or civil liability by his act,

as is frequently the case, he is at least customarily subject to social condemnation, none of which attaches here or to airborne observation generally.6/

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6. Ciraolo argues that few people would be expected to fly in an airplane in order to look at his yard for evidence of crime. (Resp. Br. 29-30.) The American Civil Liberties Union restates this as a categorical summation of how the reasonability of privacy expectations should be judged: "In this society, people do not normally expect their neighbors or the general public to surveil their backyards from an airplane." (A.C.L.U. Br. 9.)

To state the question as being whether the public is anticipated to undertake conduct identical in form, purpose and effect to that of police virtually assures that police conduct will be a search. One might just as well say people do not normally expect their neighbors to track their packages with a beeper through the streets, tail them to their door, stake out their house, record the telephone numbers they dial, pose as criminals to monitor their statements inside the home, or, in general, investigate. This should come as less than a surprise, however, since we pay the police to do those things (without a warrant). The argument of Ciraolo and defense amici proves too much. They have forgotten that the Fourth Amendment

(FOOTNOTE 6 CONTINUED)

The core danger of the sophisticated sensory enhancement devices denounced by Ciraolo does not arise from their capacity to reveal something (which is equally true of reading glasses and flashlights) but from their capacity not to reveal themselves. It is the secretive exploitation of technology, which evokes fear of the special capacities of government to insinuate itself into our lives without the ability to verify its presence.

An airplane at a thousand feet can be seen and heard. It is no more surreptitious than standing on a street corner. Indeed, standing on a street corner at least raises the possibility of vision into homes through open windows and doors. In contrast, far

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(FOOTNOTE 6 CONTINUED)

protects against unreasonable searches, not detection.

from telling police something about the interior of homes they are interested in knowing, remote aerial viewing for exposed marijuana crops outside the home, even when "focused", tells police nothing about the home's interior at all. Not only does such police activity lack objective secretiveness and the characteristic extension of senses into the home to reveal objects of interest, the technology is not of a type that exists solely, or even principally, in the control of government. Its use is widespread among numerous sectors of society and those uses frequently extend to aerial survey of lands. These considerations reflect little support for the contention that use of an airplane by police in this case was secretive technological sensory enhancement of private activities. Its use did not violate the Fourth Amendment.

II

CIRAOLO'S ADMINISTRATIVE WARRANT PROPOSAL DOES NOT HARMONIZE WITH FOURTH AMENDMENT PRINCIPLES AND PROVIDES NO GUIDANCE TO MAGISTRATES IN DISCHARGING THEIR WARRANT-ISSUING FUNCTIONS

Ciraolo's predominant theme in this Court has been that warrantless aerial observation by police is an unconstitutional intrusion into the home when focused on a specific yard to gather evidence of criminal activity. Ciraolo argues that a warrant is required whenever police make a nonexigent search of the home without consent to gather evidence. (Resp. Br. 26 citing Michigan v. Clifford, 464 U.S. ___, 78 L.Ed.2d 477, 104 S.Ct. 641 (1984) (plurality opinion).) However, for the first time, Ciraolo suggests - almost as a postscript - that "where the government's inspection needs are obvious", administrative search warrants issued on less than probable cause

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afford a "solution" to surveillance situations. (Resp. Br. 30-31.)

Ciraolo's administrative warrant proposal might be squared with his main argument if Clifford held, as he claims, that the police purpose to gather evidence activates a warrant requirement for nonexigent searches of the home. (Resp. Br. 26-27.) Under that interpretation, the governmental intent to look for evidence is relevant to the question whether legitimate privacy expectations exist which require interposition of a warrant requirement, but does not determine the kind of warrant which vindicates those expectations.

However, in so arguing, Ciraolo revises the lead opinion in Clifford. It states: "If a warrant is necessary, the object of the search determines the type of warrant required . . . If the primary object of the search is to gather

evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place searched." ___ U.S. at ___, 78 L.Ed.2d at 484; 104 S.Ct. at 647 (emphasis added.) If Ciraolo was convinced that the police intent to gather evidence rendered their conduct a search, there would be no reason to propose administrative search warrants as a "solution" to logic which, if accepted, would demand a criminal warrant.

It is not difficult to discern the source of Ciraolo's discomfort causing him to rewrite Clifford. As he appears to recognize, the governmental need for aerial observation to interdict the vast marijuana industry in the United States is at least as obvious as the need for various regulatory inspections authorized by administrative

warrants.[7] This obvious need cannot be satisfied by criminal warrants. In those cases where traditional probable cause is obtained, police have little incentive to defer application for a warrant authorizing an immediate physical search of the premises.

Although Ciraolo insists that he seeks nothing more than regulation of "focused" aerial observation of fenced residential yards, adopting his argument encourages police to conduct unfocused, area-wide observation from aircraft without a warrant. Inevitably, the next step would be to demand that such routine

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7. During 1985, California's inter-agency task force, the Campaign Against Marijuana Planting (CAMP), seized in excess of 817,000 pounds of marijuana, including over 165,000 plants, with an estimated wholesale value of $332 million. Of the 684 sites, 72% were located on private property. With wholesale values ranging from $1,500 to $2,000 a pound (see Brief of Americans for Effective Law Enforcement Inc.: 8), cultivators make significant profits from just a few dozen plants.

patrol be equated with "focused" aerial observation so as to subject all such observations to a warrant requirement.[8] Taking that step is less likely when it is realized that criminal search warrants defeat resort to aerial observation altogether.

If Ciraolo's administrative warrant proposal only fits his focus argument rather uncomfortably, it bursts the seams of his argument that the aerial observation of his yard is equivalent to a physical search of his home. The justification for permitting administrative searches on less than traditional probable cause lies not only in the important interest in abating public health hazards and the essentially non-criminal focus of the

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8. Indeed, cases are currently pending in the California state courts in which defendants seek expansion of the decision under review to achieve just that.

inspection, but also in the basic recognition that such searches typically involve "relatively limited invasion[s]" of individual privacy interests. Camara v. Municipal Court, 387 U.S. 523, 537 (1967). Ciraolo simply cannot be right in equating observation of his yard from aircraft to physical searches of the home, the chief evil addressed by the Fourth Amendment, if the invasion is, in reality, so minimal as to be satisified by an administrative warrant.

In any event, administrative warrants are not consideration exchangeable in return for legitimizing privacy expectations which society deems unreasonable. Cases in which administrative warrants were required "turned upon the effort of the government inspections to make nonconsensual entries into areas not open to the public." Donovan v. Lone Steer Inc., ___ U.S. ___, 78 L.Ed.2d 567,

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572, 104 S.Ct. 769 (1984). No such entry was made in this case.

Moreover, administrative probable cause rests upon compliance with "reasonable legislative, administrative, or judicial standards for conducting an inspection . . . with respect to a particular dwelling." Michigan v. Clifford, 464 U.S. at ___, n. 5; 78 L.Ed.2d at 484, n. 5; 104 S.Ct. at 647, n. 5. Ciraolo does not suggest any standards. Instead, he simply asserts that "a neutral magistrate could best devise appropriate procedures to protect the backyards of persons . . . from intrusion by visual or photographic surveillance." (Resp. Br. 26.)

While that argument is less than focused, Ciraolo's "solution" appears aimed at simply throwing the issue to magistrates to figure out how police can see residential fences from aircraft without simultaneously viewing

yards. Disparate results of magistrates designing flight plans for police would be inevitable. Fourth Amendment rights would be inequitably enforced. Given the difficulty of ensuring compliance with arbitrary standards set by judicial officers ill-equipped to act as Fourth Amendment flight controllers, magistrates in many cases undoubtedly will prefer to indulge in vague directives in this new form of warrant tanamount to injunctions telling police to fly but not to see (or at least not to sin when they do see).

Ciraolo agrees that ad hoc determinations of what is permissible should be avoided. (Resp. Br. 26.) We can think of nothing better aimed at compelling such determinations than his own proposal. It does not vindicate legitimate privacy expectations, much less provide meaningful guidance to police, to invent warrants grounded on the individual predilection of

magistrates and justified on the unfounded premise that airborne officers can avert their eyes from yards when fences are seen.

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III

THE COURT OF APPEAL ERRED UNDER THE FOURTH AMENDMENT

The privacy secured by the Fourth Amendment is categorically different than a mere hope that things exposed outside the home are unlikely to come to the government's attention. The concern of the authors of the Amendment was not to throw up invisible shields to the commonplace vision routinely experienced in a three dimensional world, but to ensure protection against the unreasonable searches and seizures they had so recently suffered during which the security of persons, their homes, papers and effects was, in every measure, violated. It is a highly dubious proposition that in seeking to secure the liberty denied the people who created this nation from the oppressions wreaked by the general warrant and writs of assistance, what was uppermost on their

minds was the sheriff's gimlet-eye from the stockade rampart or church belfry.

The Court of Appeal confused the security of the home with the hope of nondiscovery. Ciraolo's marijuana garden was fully open to view by police on routine air patrol. There is no reason why police should be held to have lawfully viewed it merely because they suspected its existence in advance. To order police to distinguish between open fields and fenced residential yards in the course of remote observation from navigable airspace is neither practical nor in accord with the expectations of people in the use of their outdoor property. The Fourth Amendment should not be interpreted to protect Ciraolo's yard in a way which eludes meaningful enforcement and frustrates the ability of the police to understand what is

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expected of them. The Court of Appeal's decision is defective for all these reasons.

CONCLUSION

Petitioner respectfully requests that the judgment of the Court of Appeal be reversed.

DATED: November 27, 1985

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